

ST 01-6

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE, as
responsible officer of
ABC Lounge, Inc.**

**No. 00-ST-0000
NPL # 0000
IBT # 0000-0000**

**Kenneth J. Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Stephen A. Gorman, appearing on behalf of John Doe, Mr. Shepard Smith, appearing on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to John Doe's protest of Notice of Penalty Liability No. 0000 (hereinafter the "NPL"), as responsible officer of ABC Lounge, Inc. (hereinafter "ABC") The NPL represents a penalty liability for Retailers' Occupation Tax of ABC due to the Department for the months of March, 1995, through December, 1997. A hearing was held in this matter on January 11, 2001, with Mr. Doe providing oral testimony. Following submission of all evidence and a review of the record, it is recommended that the NPL issued against Mr. Doe be finalized for the months of March, 1995, through December, 1995. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of NPL No. 7225, which shows a penalty for tax liability of ABC in the amount of \$63,048.81, including interest calculated through January 26, 2000. The NPL covers the months of March, 1995, through December, 1997. Dept. Ex. No. 1.
2. Mr. Doe has lived in the United States for 9 years. His native language is Spanish. He is now a United States citizen. Tr. p. 7.
3. On ABC's "NUC-1 Illinois Business Registration," "John Doe" is listed as "secretary." On question 14 of the form, Mr. Doe accepted "personal responsibility for the filing of returns and the payment of taxes due." Mr. Doe signed the "Signature Affidavit" in Section 7 of the NUC-1 on February 16, 1995. Tr. pp. 13-14, 15; Taxpayer's Ex. No. 1.
4. The "Sales and Use Tax Returns" for ABC for the period March through November, 1995, excluding July, contain either a written or printed signature of "John Doe." The signature on the July, 1995, return is not readable. All of the returns contain a stamp over the signature which states "Data and figures supplied by taxpayer. XYZ Accounting Service." Tr. pp. 16-20; Taxpayer's Ex. No. 1.
5. Mr. Doe's signature does not appear on the "Sales and Use Tax Returns" for 1996 and 1997. Tr. pp. 32-33.
6. State of Illinois "Domestic Corporation Annual Reports," for 1995, 1996 and 1997, for the ABC Inn list "Jones" as "President" and "Smith" as "Secretary." Mr. Doe's name does not appear on these reports. Tr. pp. 38-41; Taxpayer's Ex. No. 3.

7. On October 15, 1997, Mr. Doe tendered a written resignation “as secretary of ABC Inn effective immediately.” This resignation was accepted by Jones on the same date. Tr. pp. 42-43; Taxpayer’s Ex. No. 4.

Conclusions of Law:

The sole issue to be decided in this case is whether Mr. Doe should be held personally liable for the unpaid retailers’ occupation tax of ABC Inn. The statutory basis upon which any personal liability is premised is Section 3-7 of the Uniform Penalty and Interest Act, which provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or to make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section.
35 ILCS 735/3-7.

It is clear under the statute that personal liability will be imposed only upon a person who: (1) is responsible for filing corporate tax returns and/or making the tax payments; and (2) “willfully” fails to file returns or make payments.

The admission into evidence of the NPL establishes the Department’s *prima facie* case with regard to both the fact that Mr. Doe was a “responsible” officer and the fact that he “willfully”

failed to file and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the presumption of liability through sufficient evidence that the person was either not a responsible officer or employee, or that his actions were not willful. *Id.*

In determining whether an individual is a responsible person, the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

I have concluded, based on the testimony and evidence admitted at the evidentiary hearing, that Mr. Doe was a responsible party under the statute. Mr. Doe admitted that he signed the “NUC-1, Illinois Business Registration” as “secretary” and accepted “personal responsibility” for the filing of returns and payment of taxes due in question 14 of the form. Tr. p. 13. Mr. Doe also signed Section 7, “Signature Affidavit” on the “NUC-1.” Section 7 contains the signature of “one of the owners, general partners, executive officers or trustees.” The signer of Section 7 warrants that “[he] has examined [the] application and to the best of [his] knowledge, it is true, correct and complete.” Taxpayer’s Ex. No. 1.

Mr. Doe testified at the evidentiary hearing that at the time he signed the “NUC-1,” he could not read English and he could not understand the language of question 14. Tr. pp. 14-15. “When I signed the paper, they told me to sign it so that way I can be a secretary of the bar, but I don’t understand exactly --.” Tr. p. 14. During closing arguments, Mr. Doe’s counsel stated that “[Garcia] admits to signing a document, the NUC-1; but I think you need to take into consideration

the fact that he was signing it in the belief that he was some kind of an investor in this venture and couldn't read what it was that he was signing." Tr. p. 48. Whatever Mr. Doe's beliefs were, and whatever arrangements Mr. Doe had with the other owners of ABC, the fact is that he signed the "NUC-1" and accepted personal responsibility for the payment of taxes. Although Mr. Doe testified that he had a limited knowledge of English at the time he signed, this is not a valid defense to the case at bar. Mr. Doe could have solicited legal advice or the assistance of a translator at the time he signed the "NUC-1."

According to Mr. Doe's testimony, he resigned his position as "secretary" of ABC in October, 1997:

I asked what kind of papers I need to sign just to take my responsibility with the signature I do before, the two signatures; and they give me a paper. They say it's a quitclaim with that paper. They told me I signed those papers, that I quit with every responsibility from the signatures I do. And I asked if I can send it to the Department, and it was XYZ told me it is not necessary. He can do that. He can take care of that. He said it's okay as long as I sign. Tr. p. 42.

This testimony indicates that Mr. Doe realized that his signature as secretary on the "NUC-1" carried with it certain responsibilities and that he understood the significance of his position in the organization. Mr. Doe produced at hearing copies of "Domestic Corporation Annual Reports" for ABC for 1995, 1996 and 1997. The 1995 report is dated May 11, 1995. On all three reports, "Smith" is listed as "secretary" and Mr. Doe's name is not mentioned. Taxpayer's Ex. No. 3. These reports are obviously in conflict with the "NUC-1." However, I must conclude from Mr. Doe's resignation that he considered himself to be the secretary of ABC and that Jones, who accepted the resignation, also considered Mr. Doe to be secretary. Neither Mr. Jones nor Mr. Smith was called to testify at the evidentiary hearing. Mr. Doe signed Section 7 of the "NUC-1" as

“secretary.” This Section is signed “under penalties of perjury” and is an attestation that the “NUC-1” is “true, correct and complete.” Based on the evidence presented at the evidentiary hearing, I must conclude that Mr. Doe was in fact the secretary of ABC.

The “Sales and Use Tax Returns” for March through November, 1995, with the exception of July, contain either a written or printed signature of Mr. Doe. Taxpayer’s Ex. No. 1. Mr. Doe testified that the signatures were not his. Tr. pp. 16-21. He also testified that that he did not authorize anybody to sign his name on the forms. Tr. p. 19. Mr. Doe submitted handwriting samples so that the signatures could be compared to the signatures on the returns. Taxpayer’s Ex. No. 2. On each of the returns, the signature is either partially or totally covered by a stamp from XYZ Accounting Service. After comparing the signatures on the returns to the handwriting samples provided by Mr. Doe, I am unable to conclude that the signatures on the returns are not those of Mr. Doe.

Mr. Doe testified that in 1994 and 1995, he worked 50 to 60 hours in a warehouse and had a part time job in a car wash and in a restaurant. Tr. pp. 9, 26. According to Mr. Doe, he never worked at ABC, and never received a salary or paycheck from ABC. Tr. p. 9, 10. No “W-2” forms or Individual Income Tax Returns for Mr. Doe were offered into evidence for 1994 and 1995. No payroll records for ABC were offered into evidence. Mr. Doe testified that he never signed a check for ABC, and did not know where the bank account was located. Tr. pp. 10, 26. No cancelled checks or check authorization forms were offered as evidence for 1995, the period when Mr. Doe’s signature appears on the sales tax returns. Mr. Doe also testified that he did not hire the workers at ABC and did not keep the accounting records for ABC. Tr. pp. 26-27. No evidence was offered to support any of these statements.

In order to overcome the Department's *prima facie* case, evidence must be presented which is consistent, probable and identified with the corporation's books and records. Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d 907 (1st Dist. 1987). When the Department established its *prima facie* case, the burden shifted to Mr. Doe to overcome the presumption of responsibility through sufficient evidence. Branson, *supra*. No documentary evidence was offered by Mr. Doe to show that he was not an employee of ABC or that he did not sign checks and was not authorized to sign checks in 1995. Mr. Doe's signature appears on the "NUC-1" and "Sales and Use Tax Returns." Without any documentary evidence to support his other contentions in this case, Mr. Doe has failed to rebut the Department's presumption that he was a responsible party under the statute.

The second and remaining element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. Branson v. Dept. of Revenue, 168 Ill.2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness.

Mr. Doe's testimony indicates that he was aware that ABC was having financial difficulties. He stated that he asked for the corporate records but "they don't want to give them to me." Tr. p. 27. He was asked on redirect if he ever saw the records. He responded:

No. That's when I get upset when I don't see nothing and when I ask questions, and they don't answer me, I just try to leave the business, so that way I don't get in any trouble and lose my control and say something bad should happen, get in trouble. I just say it's smart to get away. Tr. p. 38.

"Willfulness" as used in the statute may indicate a reckless disregard for obvious or known risks. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied* 400 U.S.821 (1970). Mr. Doe did not testify as to when he asked for the corporate records. Mr. Doe signed the "NUC-1" in

1995 and submitted his resignation to ABC in October of 1997. I must conclude that at some time in this period, he was aware that taxes were not being paid. There was no testimony or documentary evidence showing any positive steps that Mr. Doe took to pay the taxes. Mr. Doe's resignation does not rebut the presumption of willfulness because the sales tax liability, except for the final two months, had accumulated prior to the resignation. I must conclude that Mr. Doe disregarded the obvious risk that taxes were not being paid, and his testimony does not rebut the Department's presumption that he willfully failed to pay the corporation's taxes.

Although Mr. Doe resigned as secretary of ABC in October of 1997, I have concluded that he was not responsible for unpaid retailers' occupation tax after the month of December, 1995. The parties stipulated at the evidentiary hearing that Mr. Doe's signatures did not appear on the sales tax forms for the years 1996 and 1997. Tr. pp. 32-33. On February 8, 2001, after the evidentiary hearing, the parties submitted a "Stipulation To Supplement Record." This stipulation states that cancelled checks from account number 022-227-1, maintained at The Bank by the ABC Inn for the years 1996 and 1997, reflect that John Doe did not sign any checks on said account.

WHEREFORE, for the reasons stated above, it is my recommendation that Notice of Penalty Liability No. 0000 be finalized for the months of March through December, 1995, and cancelled for 1996 and 1997.

ENTER:

February 26, 2001

Kenneth J. Galvin
Administrative Law Judge